Supreme Court, U.S.
FILED

No. 98 1388 FEB 26 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK FRATELLO, Jr.,

Petitioner,

against

NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

STANLEY L. COHEN
Counsel of Record
119 Avenue D., 3rd Floor
New York, New York 10009
(212) 979-7572

Attorney for Petitioner

5919

QUESTIONS PRESENTED

1. Whether the right of confrontation guaranteed by the Sixth Amendment requires a trial court to conduct a particularized assessment of the trustworthiness of an out-of-court declaration falling within a firmly rooted hearsay exception where there are facts raising questions about the declarant's personal bias and actual opportunity to observe.

2. Whether the due-process requirement of proof beyond a reasonable doubt can be satisfied where the only evidence linking the accused to the crime is a recanted out-of-court statement, the accused has been precluded from challenging the statement's trustworthiness and the prosecution has failed to disclose important information affecting the defense's strategic choices concerning the use of the recantation.

LIST OF PARTIES

Petitioner is Frank Fratello, Jr.
Respondent is the People of the State of New York.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF CONTENTS TO APPENDIX iv
TABLE OF AUTHORITIES v
OPINIONS AND JUDGMENT BELOW 1
JURISDICTIONAL STATEMENT 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7
I. THERE EXISTS AN OPEN QUESTION ABOUT THE RELATIONSHIP BETWEEN STATE HEARSAY RULES AND THE CONFRONTATION CLAUSE. 7

II. THIS COURT SHOULD ADDRESS WHETHER AND WHEN THE DUE-PROCESS CLAUSE PERMITS A CONVICTION ON THE BASIS OF A RECANTED HEARSAY DECLARATION ALONE. 15

CONCLUSION 20

APPENDIX

Decision and Order of the New York State Court of Appeals A1

Memorandum and Decision and Order of the Appellate Division, First Department, of the New York State Supreme Court A14

Trial Transcript A16

TABLE OF AUTHORITIES

Cases	Page
Acosta v. State, 417 A.2d 373 (Del. 1980)	16
Bourjaily v. United States, 483 U.S. 171 (1987)	10
Brady v. Maryland, 373 U.S. 83 (1963)	5,7,18
California v. Green, 399 U.S. 149 (1970)	8
Commonwealth v. Daye, 393 Mass. 55 (1984)	16
DiCarlo v. United States, 6 F.2d 363 (2d Cir. 1925)	16
Giglio v. United States, 405 U.S. 150 (1972)	18
Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983), cert. denied 464 U.S. 1071	10
Idaho v. Wright, 497 U.S. 805 (1990)	10, 11
In re Winship, 397 U.S. 358 (1970)	15
Jackson v. Virginia,443 U.S. 307 (1979)	7,15
Mattox v. United States, 156 U.S. 237 (1895)	9
Ohio v. Roberts, 448 U.S. 56 (1980)	passim
People v. Brown, 70 N.Y.2d 513 (1987)	3
People v. Caviness, 38 N.Y.2d 227 (1975)	11

People v. Cotto, ____N.Y.2d____(1998) 3

People v. Cuevas, 12 Cal. 4th 252 (1995) 17

People v. DelVermo, 192 N.Y. 470 (1908) 3

People v. Fratello, 243 A.D.2d 340 (1997),
affd 92 N.Y.2d___(1998) . . . . . passim

People v. Jackson, 65 N.Y.2d 265 (19) 15

People v. Spruill, 47 N.Y.2d 869 (1979) 19

Santobello v. New York, 404 U.S 257 (1971) 19

State v. Mancine, 124 N.J. 232 (1991) 16

State v. Moore, 485 So.2d 1279 (Fla. 1986) 16

Thompson v. Trevanion, 90 Eng. Rep. 179 (K.B. 1694) . 11

United States v. Agurs, 427 U.S. 97 (1976) 18

United States v. Bagley, 475 U.S. 667 (1985) 18

United States v. Hawarylk, 658 F. Supp. 112
(E.D. Pa 1987) 18

United States v. Inadi, 475 U.S. 387 (1986) 9

United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985),
cert. denied 474 U.S. 994 (1985) 18

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), cert. denied 464 U.S. 1040 (1984) 10

United States v. Orrico, 599 F.2d 113 (6th Cir. 1979) 14, 16

United States v. Seeley, 892 F.2d 1 (1st Cir. 1989) 10

White v. Illinois, 502 U.S. 346 (1992) 9,11

Constitutional Provisions

U.S. Const., Amend. V 2,15,16

U.S. Const. Amend. VI 2

U.S. Const. Amend. XIV 15

Statutes

28 U.S.C. § 1257(a) 2

N.Y. Penal Law § 110.00 3,6

N.Y. Penal Law § 120.10 6

N.Y. Penal Law § 125.25 3,6

Miscellaneous

F. Heller, The Sixth Amendment 104 (1951) 14

McCormick, Evidence (4th ed.) 10

Natali, Green, Dutton and Chambers: Three Cases in Search of a Theory, 7 Rutgers-Camden L.J. 43 (1975) 9

Stephen, The Trial of Sir Walter Raleigh, 2 Transactions of Royal Historical Society 172 (4th series 1919) 14

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term 1999

FRANK FRATELLO, Jr.,

Petitioner,

-against-

NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS BELOW

The opinion of the New York State Court of Appeals is reported. People v. Fratello, 92 N.Y.2d ___, __ N.Y.S.2d__ (1998). The Memorandum Decision and Order of the Appellate Division, First Department, is also reported. People v. Fratello, 243 A.D.2d 340, __ N.Y.S.2d __ (App. Div. 1st Dept. 1997). The judgment is not reported.

JURISDICTIONAL STATEMENT

The decision and order of the New York State Court of Appeals were entered on December 1, 1998. Jurisdiction exists under 28 U.S.C. § 1257(a) .

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V, provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const., Amend. VI, provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner Frank Fratello was convicted after a bench trial of attempted murder in the second-degree and related offenses under New York Penal Law §§ 110.00/ 125.25. The charges arose out of a December 7, 1993 incident in which an individual named Guy Peduto was shot in the back following a high speed chase through dark residential streets in the Bronx, New York. The chase ended when Peduto lost control of his car and crashed into two other vehicles that were parked in a driveway. There were no eyewitnesses to the shooting. However, Dominick Cleary, a passerby who had run to the scene shortly after he heard the sounds of the crash, approached Peduto's car, opened the door and asked him several times about the identity of the shooter. Peduto, who had been shot four times in the back and once in the back of the head, said a name that sounded to Cleary like "Frank Vitello." Cleary repeated this name to Sergeant Fitzgerald, a police officer who arrived at the crash site within a few minutes. Fitzgerald, who recognized Peduto, assumed that the injured man had been referring to Frank Fratello, one of Peduto's acquaintances. Peduto later told Officer Gardner that he had been shot by a friend named "Fitello" or "Vitello."

Following a hearing, the trial court ruled that Peduto's out-of-court statements identifying his assailant as petitioner were admissible as "excited utterances," a recognized hearsay exception under New York law. See People v. Cotto, __ N.Y.2d __ (1998); People v. Brown, 70 N.Y.2d 513 (1987); People v. DelVermo, 192 N.Y. 470 (1908). In making this ruling, the court rejected counsel's contention that the statement was unreliable because there was no reason to believe that Peduto "ever really saw anyone." Defense counsel argued that given the circumstances surrounding the assault, a "drive by"

involving a shooting "from the rear," it was probable that Peduto had merely "assumed" that petitioner was the shooter. Counsel also noted that there was evidence that Peduto had harbored animosity toward petitioner that could have led him to make such an assumption. The court, however, believed that the considerations counsel raised were subsumed within its conclusion that Peduto's out-of-court statements had been made in response to a startling event, at a time when Peduto had not yet had an opportunity to reflect. In the court's view, any other factual considerations, including Peduto's bias and opportunity to observe affected the weight rather than admissibility of the hearsay evidence.

As matters developed at trial, Peduto's hearsay declarations were the only direct evidence at trial connecting petitioner to the shooting.[1] Peduto himself testified under oath that petitioner had not attacked him on December 7, 1993. Called as a witness for the defense, Peduto stated that he had been unable to see the person who had fired at him from the shooter's car, which was about 40 feet behind him, and that he did not know the identity of the shooter. Peduto's testimony was supported by the testimony of petitioner's father's girlfriend, who stated that defendant had been at home at the time of the shooting. Significantly, reasoning that the question was within the ordinary juror's ken, the trial court refused to allow defense counsel to call an expert to testify about the impossibility of Peduto's having observed the shooter under the conditions that existed at the time of the car chase. The remainder of the trial evidence consisted principally of the People's efforts to impeach Peduto's in-court statements

---

1 Other than Peduto's declarations, the People rested after introducing evidence from a second police witness that he had seen Peduto and Fratello together on various occasions.

denying petitioner's involvement in the shooting. One of the primary sources of impeachment was Peduto's extensive personal criminal history, a history that had not been made known to petitioner either before his trial or prior to the presentation of the defense case. Additionally, a major part of the prosecution's impeachment effort of Peduto was an F.B.I. report that had been prepared by Special Agent Theodore Otto, who was investigating auto theft as part of a joint task force with the New York City Police Department. Having learned in 1993 from a New York City detective about the Peduto shooting, Otto had promptly talked to an informant who revealed that Peduto himself had previously attempted to shoot petitioner and to kill petitioner's uncle. This information was not made available to petitioner's counsel, however, until the defense had rested its case in chief. According to Otto, the prosecution did not have the information earlier because he had not realized its significance until after petitioner called Peduto to the stand as a defense witness. The trial court accepted Otto's explanation, although it was apparent from the prosecution's earlier cross-examination of Peduto that at least some sharing of this particular information had occurred previously between federal and state prosecutors.. The court also rejected defense counsel's contention that the information about the prior shooting was relevant to the risk that Peduto's hearsay statement had been infested by bias. As it did at an earlier point, the court expressed the view that Peduto's bias toward petitioner was not legally significant in light of its finding that Peduto's out-of-court statements were spontaneous. Accordingly, petitioner's request for a mistrial based on a violation of the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963) was denied.

The court, acting as factfinder, found petitioner guilty of attempted murder in the second-degree, first-degree assault and

a number of weapon counts.[2] See N.Y. Penal Law §§ 110.00, 125.25, 120.10. In so ruling, the court rejected defense counsel's summation arguments that Peduto's recanted out-of-court declarations were insufficient to constitute proof beyond a reasonable doubt. Petitioner was subsequently sentenced to an indeterminate term of imprisonment of ten to twenty years. On October 27, 1997, the intermediate appellate court affirmed the judgment of conviction, holding that the evidence was legally sufficient to support the conviction, that Peduto's out-of-court declarations were properly admitted as "excited utterances" and that the court's exclusion of petitioner's expert was not an abuse of discretion. People v. Fratello, 243 A.D.2d 340 (App. Div. 1st Dept. 1997). An Associate Judge of the New York State Court of Appeals granted petitioner leave to appeal, and on December 1, 1998, the State's highest court affirmed. People v. Fratello, 92 N.Y.2d __ (1998). In ruling that there had been no error in the admission of Peduto's out-of-court statements as "excited utterances," the Court of Appeals opined that "the trial court necessarily rejected [petitioner's] objections based upon the asserted inability of Peduto to have observed [petitioner] as one of the shooter." *Id.*, at __. The Court of Appeals then went on to base its own holding on "[t]he undisturbed findings by the courts below that Peduto had an opportunity to observe who attacked him." *Id.*, at __. The Court rejected petitioner's appellate contention that "[i]n the case of hearsay statements necessarily made by the declarant outside the presence of the trier of fact, the prosecution is required to demonstrate the reliability of the out of court statement." Appellant's Brief to the Court of Appeals,

---

2 Parenthetically, it should be noted that the court deliberated more than 90 days following the conclusion of this year long bench trial before returning its verdict.

p 14, citing Ohio v. Roberts, 448 U.S. 56 (1980). The Court of Appeals also rejected petitioner's contention that the recanted out-of-court declaration of Peduto was not sufficient to satisfy the constitutional reasonable-doubt standard as delineated in Jackson v. Virginia, 443 U.S. 307 (1979). Appellant's Brief to the Court of Appeals, at 52-61. The Court did not address petitioner's claim that his federal due-process rights under the Brady v. Maryland, 373 U.S. 83 (1963) disclosure rule had been violated.

REASONS FOR GRANTING THE WRIT

In Ohio v. Roberts, 448 U.S. 56 (1980), this Court held that an out-of-court declaration falling within a firmly rooted hearsay exception is presumptively reliable and that the Confrontation Clause of the United State Constitution does not require an individualized reliability assessment before the declaration may be admitted as evidence in chief. The decision in Ohio v Roberts and its progeny, however, does not address the important question whether the presumption is rebuttable and whether there is a constitutional need for a further inquiry where, as here, there are facts suggesting that the declarant did not have an adequate opportunity to observe or that the declaration was unconsciously influenced by the declarant's bias. A writ should also be granted because the facts in this case present the Court with an opportunity to address whether and when a recanted hearsay declaration can alone constitute proof beyond a reasonable doubt.

I.

THERE EXISTS AN OPEN QUESTION ABOUT THE RELATIONSHIP BETWEEN STATE HEARSAY RULES AND THE CONFRONTATION CLAUSE.

In this case, the New York State Court of Appeals assumed that in resolving the question of the admissibility of Peduto's "excited utterance" the trial court "necessarily" found that Peduto had had an adequate opportunity to observe the face of the shooter. People v. Fratello, 92 N.Y.2d __ (1998). In fact, as is evident from the trial court's discussion of the issue, it never even considered whether Peduto had actually had the opportunity to see his assailant or whether Peduto's initial belief about the shooter's identity was tainted by bias arising from the parties' past relationship. To the contrary, once the trial court determined that Peduto's statement to Cleary qualified for admission under the "excited utterance" hearsay exception, it declined to consider the specific facts that cast doubt on the statement's trustworthiness. Instead, the court concluded that there was no need to weigh those specific facts because the reliability of the statements was assured by their apparent "spontaneity."

The trial court's refusal in this case to look beyond the factors relevant to the "spontaneity" of the victim's out-of-court declarations raises an important question about the extent to which the actual reliability of an out-of-court statement is still a relevant consideration under this Court's Confrontation Clause precedents. Over the past 29 years, this Court has repeatedly spoken on the relationship between the Confrontation Clause of the Sixth Amendment to the United States Constitution and the state and federal evidentiary rules permitting the admission of certain out-of-court declarations in criminal trials. Beginning

with California v. Green , 399 U.S. 149 , 155-156 (1970), the Court has developed and refined a body of case law that flows from the core premise that the Confrontation Clause and the rule against hearsay "are generally designed to protect similar values," although their governing principles are not precisely coextensive. As is true with the rules governing the admissibility of hearsay, the touchstone for Confrontation Clause analysis has always been the degree to which the reliability of the evidence is assured. See, e.g., Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); Mattox v. United States, 156 U.S. 237, 244 (1895).

Ohio v. Roberts established the analytical framework that has been used for the past twenty years. The Court held in that case that the Confrontation Clause forbids admission of out-of-court statements unless they bear "adequate 'indicia of reliability.'" Ohio v. Roberts, 448 U.S., at 66. In an effort to devise a rule that would both promote the value of trustworthiness and also respond "to the need for certainty in the workaday world of conducting criminal trials," the Ohio v. Roberts Court stated that, in general, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

Despite the apparent simplicity of this formula, the Court has made clear that "'no rule will perfectly resolve all possible problems,'" Ohio v. Roberts, 448 U.S., at 68 n. 9, quoting Natali, Green, Dutton, and Chambers: Three Cases in Search of a Theory, 7 Rutgers-Camden L.J. 43, 73 (1975); see United States v. Inadi, 475 U.S. 387, 392 (1986). Thus, in the years since Ohio v. Roberts, the Court has been called upon to address the degree to which the declarant's unavailability is an

important consideration in the analysis under the Confrontation Clause. White v. Illinois, 502 U.S. 346 (1992); United States v. Inadi., 475 U.S. 387 (1986). The Court has also had to consider whether certain classes of admissible out-of-court declarations constitute "firmly rooted hearsay exception[s]," White v. Illinois, 502 U.S., at 355, 356 n.8 (spontaneous declarations); Idaho v. Wright, 497 U.S. 805 (1990) (statutory "residual" exception); Bourjaily v. United States, 483 U.S. 171 (1987) (co-conspirator's declarations), and what standard of analysis should be applied to hearsay exceptions that do not qualify as "firmly rooted"exceptions, Idaho v. Wright, *supra*.

One of the critical questions that remains open is whether the inference of reliability that arises in cases involving "firmly rooted hearsay exceptions" is subject to rebuttal where there are particularized circumstances suggesting that the evidence is untrustworthy. Although this Court has stated that "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception,'" Bourjaily v. United States, 483 U.S., at 183, quoting Ohio v. Roberts, 448 U.S., at 66, it has never suggested that that principle is an inflexible one or that there could never be circumstances in which the reliability of such evidence is so undermined by particular, case-specific factors that its admission would contravene the Confrontation Clause's core values. This Court's resolution of the question is important because several Circuit Courts appear to have adopted the broad principle that firmly rooted hearsay exceptions will almost always "survive Confrontation Clause scrutiny because the 'trustworthiness' issue has already been decided in favor of admissibility." United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983) , cert. denied 464 U.S. 1040 (1984); see United States v. Seeley, 892 F.2d 1, 2 (1st Cir. 1989). In contrast, at least one noted commentator has observed that such

factors as the declarant's opportunity to observe should be considered even where the veracity of the out-of-court declaration is otherwise inferable from the circumstances under which it was made. McCormick, Evidence p 221 (4th ed.); see also, Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1058 (6th Cit. 1983), cert. denied 464 U.S. 1071 (1984) (no Confrontation Clause violation where declarations fell within firmly rooted hearsay exception and where there was "no showing that the statements were untrustworthy"); 6 Wigmore, Evidence (Chadbourne ed. 1976) § 1751, at 222, 224 ("excited utterance" should not be admitted unless it may be inferred that declaration is based on personal observation; however, declarant's bias is a matter affecting the declaration's weight, not its admissibility).

The assumption that out-of-court declarations falling within a "firmly rooted" hearsay exception are generally reliable is based on "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S., at 817. The rules of law that result from such experience are necessarily the products of generalizations arising from situations in which the declarant's opportunity to observe was undisputed. See, e.g., White v. Illinois, 502 U.S. 346; Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 86 (1980). Consequently, the foundation showings required for establishing most "firmly rooted" hearsay exceptions are aimed at the problem of deliberate falsity rather than honest mistake. See, e.g., White v. Illinois, 502 U.S., at 356. The "spontaneous statement" or "excited utterance" exception, for example, which is rooted in the seventeenth century, Thompson v. Trevanion, 90 Eng. Rep. 179 (K.B. 1694), is premised on the notion that a statement made in response to a startling event before the declarant has had an opportunity to reflect is highly unlikely to

be the product of prevarication. See, e.g., People v. Caviness, 38 N.Y.2d 227 (1975). Since honest mistakes are as inimical to reliability as are deliberate falsehoods and since the Confrontation Clause's touchstone is reliability, see, Ohio v. Roberts, 448 U.S. 886 (1980), it follows that the jurisprudence governing the constitutional right of confrontation must provide a means for considering, in a proper case, any particularized facts and circumstances that subvert an out-of-court declaration's accuracy. This is such a case.

Indeed, contrary to the assumption of the New York courts in this case, the suggested inquiry is not subsumed within the analysis that has traditionally been invoked to justify the admission of "exited utterances" and other categories of "firmly rooted" hearsay exceptions. An out-of-court statement made immediately after a startling incident and before the declarant has had the time or opportunity to reflect may be "reliable" in the sense that it poses little risk of conscious deception. It does not follow, however, that a statement made under those circumstances is also necessarily accurate and free of unintentional distortion. It is possible, for example, that a declarant who has not really had an adequate opportunity to observe has nevertheless unconsciously filled in the gaps by making a series of assumptions that led him or her to conclude that a particular state of affairs actually existed. Certainly, the human mind is not immune to mistakes and accidents of misperception when it is subjected to the stressful conditions that accompany "excited utterances," "dying declarations" and other forms of admissible hearsay.

Moreover, the traditional methods for testing witnesses' accuracy through cross-examination are unavailable in many cases involving out-of-court declarations. In this case, for example, Peduto was physically available and, in fact, made a

live appearance before the court. However, because his position at trial was that he had not observed petitioner at the time of the shooting, it was impossible for defense counsel to question him about the accuracy of his observations or the effect of such factors as the lighting conditions, the speed of the vehicles, the focus of his attention and his own preconceptions upon the accuracy of his statement to Cleary that petitioner was, in fact, his attacker. It is thus no answer to suggest, as the trial court did, that the factual matters counsel proffered were relevant to the weight but not the admissibility of Peduto's out-of-court declarations. Given the posture of the case, there was no way for the accuracy of those statements to be tested before the factfinder and, consequently, there was nothing for the factfinder to weigh. Accordingly, once the declarations were deemed admissible, they were, in effect, beyond impeachment -- a result wholly incompatible with the fundamental values underlying the Confrontation Clause.

This case presents a sound vehicle for resolving the degree to which the Confrontation Clause requires consideration of facts that potentially undermine the accuracy of an otherwise admissible hearsay declaration. Although Peduto's statements may have been made spontaneously and at a time when there was no opportunity to reflect, there were a number of case-specific facts that cast serious doubt on their factual reliability. The shooting took place late at night during the course of a car chase through dark residential streets (Transcript: 365, 368, 373, 521). Compounding the visibility problems, the windows of Peduto's car were tinted (Transcript: 368). The shots all entered Peduto's body from the back (Transcript: 318-319), indicating that he was turned away from the direction of the shooter for most, if not all, of the chase. Furthermore, there was evidence that Peduto was hostile toward petitioner. Indeed, only a month before the assault on Peduto took place, petitioner

was shot by an unknown assailant. As was later disclosed after the close of the defense case, law enforcement authorities were aware that Peduto had been the culprit. Knowing that he had previously attacked petitioner, Peduto could well have concluded that the person who fired at him was petitioner.

Although, as a "firmly rooted" hearsay exception, Peduto's "excited utterance" was presumptively reliable under Ohio v Roberts, *supra*, the existence of these special circumstances should have raised questions for the trial court about the risk of mistake or inaccuracy. Once those questions were raised, the Ohio v Roberts rationale for admitting the declarations in evidence without further inquiry was vitiated and there was a valid, indeed compelling, reason to look beyond the generic factors for admitting "excited utterances." The trial court's refusal to do so elevated the presumption of reliability associated with this "firmly rooted" hearsay exception to an irrebuttable one, foreclosing consideration of whether Peduto's statements were factually flawed. Moreover, because Peduto's recantation of his earlier statement made cross-examination about prior accuracy and bias impossible, cf., United States v. Orrico, 599 F.2d 113, 117 (6th Cir. 1979), petitioner was deprived of any and all opportunity to challenge or test the trustworthiness of the sole piece of evidence connecting him to the crime. Such a result is abhorrent to the fundamental values reflected in the Confrontation Clause, which some believed was inspired, in part, by the plight of Sir Walter Raleigh, who was condemned on the basis of a deposition that was later recanted. See, United States v Inadi, 475 U.S., at 411 (Marshall, J., dissenting), citing F. Heller, The Sixth Amendment 104 (1951); Stephen, The Trial of Sir Walter Raleigh, 2 Transactions of the Royal Historical Society 172 (4th series 1919). Granting *certiorari* in this case would give the Court an opportunity to address this important constitutional problem.

II.
THIS COURT SHOULD ADDRESS WHETHER AND WHEN THE DUE-PROCESS CLAUSE PERMITS A CONVICTION ON THE BASIS OF A RECANTED HEARSAY DECLARATION ALONE.

This case also presents an opportunity for the Court to address the interaction between the Confrontation Clause and the guarantee of due process. Even assuming that there was no error in the decision of the trial court to admit Peduto's out-of-court declaration without considering its actual trustworthiness, an open question exists as to whether and when a repudiated hearsay declaration is in itself sufficient to support a conviction under the standard of proof required by the Due Process Clause of the United States Constitution. U.S. Const., Amends. V, XIV. Distinguishing its own precedent, People v. Jackson, 65 N.Y.2d 265 (1985), the New York Court of Appeals concluded that the conviction in this case satisfied due-process standards even though the only evidence of petitioner's guilt was a recanted hearsay statement because there was a rational basis for the trier of fact to choose to believe the out-of-court declaration rather than the declarant's contrary in-court testimony. People v. Fratello, 92 N.Y.2d __ . In so ruling, the Court of Appeals relied on what it viewed as the inherent reliability of an "excited utterance," as well as on the cross-examination and extrinsic impeachment of Peduto. 92 N.Y.2d, at __.

Whether a hearsay statement that has since been recanted is sufficient to constitute proof beyond a reasonable doubt, as required by In re Winship, 397 U.S. 358 (1970) and Jackson v. Virginia, 443 U.S. 307 (1979), is a question that this Court has not yet answered. State courts have used a variety of analyses. The California Supreme Court, for example, has held that when

a repudiated out-of-court identification is the only evidence of guilt, the sufficiency analysis should look to "the probative value of the identification and whatever other evidence there is in the record." People v Cuevas, 12 Cal. 4th 252, 274 (1995). Massachusetts and Florida permit uncontradicted out-of-court identification statements to serve as the sole evidence for a conviction, but those states require additional supporting evidence where the identifying statement has been recanted. State v. Moore, 485 So. 2d 1279 (Fla. 1986) Commonwealth v Daye, 393 Mass. 55 (1984). The New Jersey courts have held that an admissible out-of-court statement is sufficient "as long as the statement is generally corroborated and its reliability is supported by the circumstances under which it was given." State v. Mancine, 124 N.J. 232, 252 (1991). Delaware has approved the use if such statements as the sole proof of guilt, but has noted that "a fair trial require[s] special advice to the jury as to the unusual care that must be taken before convicting a defendant * * * solely on the out-of-court statement of the victim inconsistent with her own in-court testimony." Acosta v. State, 417 A.2d 373, 377-378 (Del. 1980). Similarly, an early decision by the Second Circuit concludes that there is nothing inherently problematic about a jury rejecting a witness's in-court testimony in favor of a more credible out-of-court declaration. Di Carlo v. United States, 6 F.2d 364, 368 (2d. Cir. 1925). In contrast, the Sixth Circuit has stated that an out-of-court statement might alone constitute legally sufficient evidence, but only where there are strong indicia of reliability and the evidence is used to establish "a purely technical element of [the] crime." United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979).

It is evident from the existing precedent that there is considerable discomfort with the notion of resting a criminal conviction solely on a repudiated out-of-court statement. Even

where convictions on such evidence have been unequivocally approved, there has been an insistence on "adequate safeguards against the unjust conviction of a defendant solely on the basis of an unreliable out-of-court identification." People v. Cuevas, 12 Cal. 4th, at 274-275. Such safeguards include "the availability of the identifying witness for cross-examination" and "the opportunity of the defense to present other evidence questioning the reliability of the out-of-court identification." *Id.*

As noted above, this is a case in which the identified safeguards were not present. Peduto could not be cross-examined about the accuracy of his "excited utterance" because he denied its contents. Moreover, because the trial court concluded that the declaration was irrebuttably reliable, petitioner was precluded from presenting evidence to challenge its actual trustworthiness. Further stymied in his efforts to challenge the admissibility of the "excited utterance" on grounds of inaccuracy and bias, petitioner was also frustrated in his efforts to present a defense by the prosecution's failure to make timely disclosure of certain critical information and by a trial court ruling that improperly foreclosed an otherwise valid collateral attack on the accuracy of the hearsay evidence.

In declining to permit defense counsel to call an expert to testify about the scientific reasons why Peduto could not have seen enough to identify his assailant, the trial court cut off petitioner's one remaining opportunity to challenge the only evidence of guilt that the prosecution offered. Under these circumstances, a conviction on the basis of the out-of-court declaration alone is antithetical to the fundamental notions of fair play that are associated with due process.

The unfairness of convicting petitioner on the basis of Peduto's recanted "excited utterance" without more was compounded by the prosecution's disregard of its responsibilities under Brady v. Maryland, 373 U.S. 83 (1963),

which, as a matter of due process, requires the disclosure of evidence that could be helpful to the defense in the preparation of its case. The disclosure requirement is not limited to evidence that is exculpatory, but also applies to information that would aid in the development of trial strategy or in the impeachment of witnesses, United States v. Bagley, 475 U.S. 667, 682-683 (1985); Giglio v. United States, 405 U.S. 150, 154-155 (1972), including the makers of out-of-court statements who are not expected to testify at trial. See United States v. Jackson, 757 F.2d 1486, 1491 (4th Cir. 1985), cert. denied 474 U.S. 994 (1985); United States v Hawarylk, 658 F. Supp. 112, 117 (E.D. Pa. 1987). As this Court has noted, the harm resulting from a failure to comply with Brady is most acute where, as here, "the verdict is already of questionable validity" and, consequently, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, 427 U.S. 97, 112-113 (1976).

In this case, the harm resulting from the government's failure to promptly disclose to the defense information about Peduto's criminal background was self-evident. Had defense counsel been aware of the prior shooting incident between petitioner and Peduto, he would undoubtedly have framed his argument about the admissibility of Peduto's out-of-court declaration far more forcefully. Moreover, had counsel known about Peduto's unsavory criminal history, he might well have elected not to call him as a witness at all, electing instead to rest his case on the testimony of his alibi witness alone. Certainly any value to the defense that Peduto's in-court recantation may have had was vitiated by the prosecutor's devastating cross-examination about Peduto's prior criminal history. Moreover, had the government complied with its well settled Brady obligation to provide to the defense evidence of Peduto's extensive criminal history pre-trial, the defense might

well have opted to try this case by jury, as opposed to the court, to insure that much if not all of the highly prejudicial information about Peduto's and petitioner's backgrounds would not otherwise be placed before the trier of fact. Notably, the trial court's conclusion that the State prosecutors were not accountable for Otto's dereliction is not sustainable in light of the close cooperation between the federal investigators and the New York City law enforcement authorities. Further, in light of the fact that Otto was part of a joint federal-New York City investigation, any knowledge he had should have been attributed to the New York City authorities. See, People v. Spruill, 47 N.Y.2d 869 (1979); see also, Santobello v New York, 404 U.S. 257 (1971).

In sum, even assuming that Peduto's "excited utterance" was properly admitted without a further inquiry into its trustworthiness, it was not sufficient to constitute proof beyond a reasonable doubt. Moreover, the manner in which petitioner's prosecution was conducted deprived him of all possibility of presenting a defense. Having been foreclosed from presenting extrinsic expert proof to challenge the actual reliability of the Peduto statement, petitioner had no choice but to use Peduto's live recantation, a strategy that backfired because of the prosecution's failure to disclose its knowledge of facts establishing Peduto's incredibility as a witness. Ironically, it was the devastating impeachment material elicited during the prosecution's cross-examination of Peduto that led the New York Court of Appeals to conclude that the trier of fact was justified in relying on Peduto's hearsay declaration rather than his inconsistent in-court testimony. Under the circumstances, petitioner's right to due-process was violated.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
February 24, 1999

Respectfully submitted,

STANLEY L. COHEN
Attorney for Petitioner
351 Broadway, Third Floor
New York, N.Y. 10013
(212) 979-7572

Decision and Order of the New York State Court of Appeals

NEW YORK STATE COURT OF APPEALS

1998 N.Y. Int. 152
December 1, 1998

1 No. 164

Decided December 1, 1998

LEVINE, J.:

Defendant was convicted, following a bench trial, of attempted murder second degree, and criminal possession of a weapon second and third degrees. All of the charges arose out of the shooting of Guy Peduto shortly after 2 a.m., December 7, 1993, during a car chase in the Throgs Neck section of the Bronx. Peduto received serious head and body wounds. The rear window of the Pontiac sedan he was driving was shot out and there were multiple bullet holes in the automobile. When he was hit, Peduto lost control of the vehicle and crashed into two cars parked in a driveway. His assailants fled in their vehicle, leaving two Acura hubcaps and five 9 millimeter bullet casings at the scene.

Two out-of-court statements by Peduto, naming defendant as one of his attackers, were admitted into evidence under the "excited utterance" exception to the hearsay rule (see, People v. Nieves, 67 NY2d 125, 135). The first of Peduto's accusatory declaration was made to Dominic Cleary, a layperson who was walking to his home nearby when he heard gunshots and the crash, and came to Peduto's assistance. The second statement implicating defendant was made about ten minutes later to

Officer Dennis Gardner, the first of the police to arrive at the scene.

Peduto was not called to the stand by the prosecution, having recanted his previous identifications of defendant in an affidavit submitted by the defense before the trial. Instead, Peduto was called as a defense witness. At the time of the trial, he was in a United States detention facility awaiting trial in Federal criminal charges. In his direct testimony he denied defendant was one of the persons who shot him. On cross-examination by the prosecution, he denied having told anyone that defendant had shot him. He described in detail the physical appearance of the person he saw firing at him. Peduto also acknowledge a 15-year close friendship with defendant and admitted that he had an extensive criminal record arising out of his activities as a carjacker. He invoked his privilege against self-incrimination in response to other questions about specific car thefts, and his criminal associates, including one Glicerio Castaldo.

The People introduced rebuttal evidence that Peduto had told another police officer, John Fitzgerald, both at the scene of the incident and after his removal to a hospital, that defendant was one of the shooters. Another officer, Detective George Wood, testified to a later conversation with Peduto at the hospital, after Peduto had been told by hospital personnel that he would survive the shooting. Peduto told Detective Wood that he knew the identity of the shooter but refused to name him, explaining that "I will take care of it myself." The People also called Glicerio Castaldo as a rebuttal witness. Castaldo had been a criminal confederate of Peduto who became and FBI informant under a plea agreement. He recounted a visit with Peduto after he left the hospital. Peduto had described in detail how defendant drove up beside his car in a white Acura Legend when the shooting began, both defendant and an

another acquaintance firing at him. Peduto also told Castaldo that now that he had recovered from his wounds, "he had to go get it straightened out."

The trial court sitting without a jury rendered a guilty verdict. The Appellate Division affirmed (___AD2d___). A Judge of this Court granted defendant leave to appeal, and we now also affirm.

In urging reversal, defendant's initial attack is on the admissibility, under the excited utterance exception, of Peduto's extra-judicial statements identifying defendant as his assailant. Defendant's arguments are unavailing. The testimony of Cleary was that he came to Peduto's aid less than a minute after the car crash. Peduto was bleeding profusely, moaning in pain and begging for help. Peduto twice named defendant when Cleary asked who shot him. Officer Gardner, who assisted removing Peduto from the vehicle and transferring him to an ambulance, stated that Peduto was crying hysterically, repeatedly asking whether he was going to die. Peduto identified defendant as the person who shot him, and repeated the name over and over again. He referred to defendant as a one-time friend. Peduto also told Gardner that the assault vehicle defendant drove was a white Acura.

The foregoing evidence represents near-classic examples of the excited utterance exception. Thus, the trial court could readily conclude that Peduto's statements were admissible under that exception as "spontaneous declaration made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation" (People v.

Caviness, 38 NY2d 227, 230-231). That the declarations were made in response to questioning, and that there was an approximately ten-minute interval from the happening of the event until the second declaration was made to Officer Gardner, would not impair their admissibility, since neither of these factors detracted from their spontaneity under the circumstances as described by the witnesses to whom Peduto spoke at the crime scene (see, People v. Cotto, 92 NY2d 68, 79; People v. Edwards, 47 NY2d 493, 497-498).

Defendant, however, contends that the circumstances of a nighttime attack during a high-speed car chase demonstrated that Peduto lacked the capability of recognizing him as one of the attackers. To be sure, for an excited utterance to be admissible, it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration (see, 6 Wigmore, Evidence § 1751, at 222 [Chadbourne ed 1976]). In most instances, that requirement is satisfied self-evidently from the circumstances that the declarant was an actual participant in the event which is the subject of the declaration (id.).

Here, the evidence permitted the trial court reasonably to infer that Peduto had a sufficient opportunity to observe who attacked him and to identify defendant as one of the shooters. Peduto had been a close personal friend of defendant for many years. The car chase was extended over more than a city block, which was illuminated by street lights. Peduto, in his statement to Officer Gardner, was apparently able accurately to identify the crime vehicle as a white Acura Legend, as confirmed by the hubcaps found at the scene. Moreover, Peduto testified that he could and did observe one of the attackers through his rearview mirror during the pursuit sufficiently to describe his appearance in detail.

The trial court was charged with the responsibility of resolving a mixed question of law and fact in its initial determination of the admissibility of the Peduto declarations as excited utterances (see, People v. Edwards, *supra*, 47 NY2d, at 497; People v. Caviness, *supra*, 38 NY2d at 231). In making that initial determination of admissibility the trial court necessarialy rejected defendant's objection based upon the asserted inability of Peduto to have observed the defendant as one of the shooters. The Appellate Division, in upholding the admissibility of Peduto's declarations under the excited utterance exception, agreed: "The declarant was a participant in the events, clearly speaking from his personal observation" (__ AD2d__, at__). The undisturbed findings by the courts below that Peduto had an opportunity to observe who attacked him have support in the record and are, thus, beyond our further review (see, People v. Cotto, *supra*, 92 NY2d, at 76-77).

Nonetheless, defendant asserts that the trial court committed reversible error in connection with the admission of Peduto's statements, in refusing to receive (1) expert testimony on night visual perception under Peduto's circumstances; and (2) evidence, disclosed by the prosecution to the defense, that Peduto was biased against defendant because he feared retaliation for his own previous assault on defendant. It was well within the trial court's sound discretion to reject expert testimony on a matter (night visibility) that is a subject of common experience of lay triers of fact (see, People v. Mooney, 76 NY2d 827, 828; People v. Cronin, 60 NY2d 430, 433).

Nor do we discern any error in the trial court's treatment of Peduto's claimed bias against defendant on the admissibility of his declaration. Generally, the bias of an excited utterance declarant functions as a basis for impeachment of the declaration, thus pertinent to the weight, rather than

admissibility of the declaration (see, 6 Wigmore, Evidence, op.cit. § 1751, at 224). That was the ruling of the trial court here. To the extent that defendant contends that Peduto's bias prompted him to name defendant without actually having made any observation of his attacker, defendant is foreclosed by the undisturbed findings, already discussed, that Peduto's identification was based upon personal observation.

Defendant raises one other point requiring extended discussions -- his challenge to the sufficiency of the evidence to support a guilty verdict. Specifically, defendant points to the fact that the prosecution's entire case was based upon Peduto's spontaneous declarations naming defendant as one of his assailants. Defendant notes that Peduto's extra-judicial accusatory statements were directly contradicted by his in-court testimony, in which he denied that defendant shot him and swore that another man, whose appearance was drastically different, was the actual shooter. Defendant claims that these conflicting versions of the facts rendered by Peduto require reversal and dismissal as a matter of law. Defendant relies upon the rule articulated most recently in People v. Jackson, 65 NY2d 265, at 272):

> "When all the evidence of guilty comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for its determination of either." (See also, People v. Foster, 64 NY2d 1144, 1147; People v. Stewart, 40 NY2d 692, 699; People v. Reed, 40 NY2d 204, 208-210l People v. Ledwon, 153 NY 10).

We, however, do not read Jackson and its predecessors as

setting up a per se rule to be applied uncritically in all such cases without an evaluation of the nature and quality of the conflicting, inculpating and exculpating renditions of the event by the single prosecution witness. As explained in Jackson, dismissal of a directed verdict because of hopelessly contradictory testimony from the single prosecution witness follows from principles related to "the relevant functions of judge and jury respecting reasonable doubt" (65 NY2d, at 271). The Jackson decisions quotes extensively from the District of Columbia Circuit's decision in Curley v. United States (160 F2d 229, cert. denied 331 US 837, reh denied 331 US 869) in explaining that the rule announced in Jackson is derived from general principles governing when a court should take a criminal case away from the jury.

As explained in the quoted excerpts from Curley, while the jury has the authority to determine credibility, weigh evidence and draw inferences from proven facts, "[i]t is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation" (People v. Jackson, *supra*, at 271 [quoting United States v. Curley, *supra*, 160 F2d, at 232]). Thus, the decision of the trial judge to take the case from the jury by dismissal or directed verdict of acquittal will turn on the foregoing distinctions between mere conjecture and evidence-based conclusions. "In a given case *** that determination may depend on the difference between pure speculation and legitimate inference from proven facts" (People v. Jackson, at 272 [quoting United States v. Curley, at 233]).

In Jackson we explained how the foregoing general principles of the Curley opinion might apply to a case where the only prosecution witness has given totally irreconcilable versions of the events -- one incriminating, the other exonerating, the

defendant. In such a case, we said, when the irreconcilability affords no foundation in the proof for the jury to resolve the conflict in the witness's testimony, dismissal is warranted because "the jury is left without basis, other than impermissible speculation" to decide guilt or innocence (65 NY2d, at 272).

A corollary of the Jackson rule on self-contradictory witness's testimony, and its rationale, however, is that when the jury, acting within its rightful province of determining credibility, weighing evidence and drawing justifiable inferences from proven facts, has an objective, rational basis for resolving beyond a reasonable doubt the contradictory inculpating and exculpating versions of the events given by the witness, its determination of guilt is no longer based on "impermissible speculation" and should be upheld. We consider this the sounder view, which is the analysis adopted in several other jurisdictions, testimony and earlier statements (see, DiCarlo v. United States, 6 F2d 364 [2d Cir] [L.Hand,J.]; People v. Cuevas, 12 Cal 4th 242, 906 P2d 1290; State v. Mancine, 124 NJ 232, 590 A2d 1107; Acosta v. State, 417 A2d 373 [Del]; see also, McCormick, Evidence § 251, at 118-120 [4th ed]; contra, United States v. Orrico, 599 F2d 113 [6th Cir]).

Indeed, we faced an analogous issue in People v. Cotto, *supra*. There, as here, an eyewitness at trial recanted an earlier accusatory statement against defendant, and at the Sirois hearing to determine whether his changed position was the result of defendant's witness-tampering, the witness also recanted earlier statements to law enforcement authorities that he had been threatened. Nonetheless, we upheld, as amply supported by the evidence, the trial court's reasoned resolution of the conflicts in the witness's versions, crediting his out-of-court statements that he was coerced (see, People v. Cotto, *supra*, 92 NY2d, at 76).

Here, the trial court as trier of fact had a sufficient, non-speculative basis to resolve the contradictions between Peduto's out-of-court statements implicating defendant in the crimes, and his exonerating testimony at the trial. First, as excited utterances, Peduto's out-of-court accusatory declarations, made without opportunity for reflection while he was crying hysterically and repeatedly asking whether he was going to die, could rationally and objectively have been credited by the trial court as inherently more reliable than Peduto's later versions, formulated once "there ha[d] been time to contrive and misrepresent" (People v. Brown, 80 NY2d 729, 736). Second, as the Appellate Division found, the cross-examination of Peduto and other impeachment evidence gave the trial court an "ample basis [for] discrediting the victim's highly suspect and thoroughly impeached efforts, as a defense witness, to exculpate defendant" (___AD2d__, at___). Thus, based upon the cross-examination, as well as the testimony of Detective Wood and Glicerio Castaldo, the trial court could well have concluded that Peduto perjured himself in his exculpating testimony in conformity with the moral code of his criminal sub-culture -- of non-cooperation with official law enforcement efforts to prosecute the perpetrator of the crimes against him, in favor of resort to retributive self-help (see, People v. Chaves, 26 Cal 3d 334,364, 605 P2d 401, 420 [in light of witness's statement that "the whole matter should be settled in the streets' rather than in court ***the jury had a sound basis for discounting the witness' trial testimony" in crediting his prior accusatory statement]). Thus, the rule of People v. Jackson and its predecessors does not afford a basis to disturb the trial court's verdict of guilt.

Defendant's remaining arguments, including the contention that the People failed to turn over materials as required by Brady v. Maryland, 373 US 83 and People v. Rosario, 9 NY2d 286, are either unpreserved or without merit. Accordingly, the order of

the Appellate Division should be affirmed.

People v. Frank Fratello
No. 164

SMITH, J. (dissenting):

Because I believe the evidence was insufficient to convict the defendant of attempted murder and related crimes, I dissent. The sole evidence against the defendant was a repudiated statement that the shooter was defendant Frank Fratello. Made by the victim, Guy Peduto, at the scene of the crime, the statement was admitted at trial as an excited utterance. Because the circumstances of this case cast doubt on the reliability of the witness and the statement, the evidence was insufficient and the indictment should be dismissed.

Peduto was shot from behind during a high speed car chase in the County of the Bronx, New York City on December 6, 1993. During the incident Peduto's car crashed into two other vehicles which were parked in a driveway of a private residence. A witness to the incident, Dominic Cleary, went to the car which Peduto was driving and asked him what happened. The victim indicated that he had been shot by Frank Fratello. By an affidavit signed on December 13, 1993, Peduto repudiated the statement and insisted that Frank Fratello had not shot him. At trial Peduto testified that the defendant had not been the shooter.

Normally, a statement is admitted as an excited utterance because it is made under stress and under conditions which indicate that is reliable since it is made without reflection. In People v. Edwards, 47 NY2d 493, we stated:

> The admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection.

Here there was animosity between defendant and Peduto. The evidence was that defendant and Peduto knew each other from childhood and had been involved together in criminal activity. However, there had been a falling out between the two to such an extent that the victim had allegedly shot defendant and attempted to kill one of the defendant's relatives. From the time of that incident, Peduto had to fear for his own safety. From the time the car chase began, it was reasonable for Peduto to suspect that the defendant was involved and to name him as the perpetrator whether or not there had been an actual sighting. Second, given the history and character of Peduto, any statement which he made, inculpatory or exculpatory, could not be found reliable beyond a reasonable doubt and constitute the

sole basis for convicting defendant.

In none of the cases cited by the majority or the People was a repudiated statement, admitted as an excited utterance, used as the sole basis for conviction. In People v. Brown, 70 NY2d 513 statements by the deceased made to his mother and police prior to his death, identifying the persons who shot him, were admitted into evidence as excited declarations. The assailants were seen running from the scene of the shooting. The victim never repudiated the statement.

In People v. Cotto, 92 NY2d 68 a statement by the deceased identifying the shooter, made to the police as he lay dying in an ambulance, was admitted as an excited utterance. In that case the identification by an eyewitness was also admitted even though the witness refused to identify the defendant at trial. The statement by the dying victim was never repudiated.

In People v. Edwards, 47 NY2d 493 the statements of a dying victim identifying the defendant as the person who stabbed her were admitted as excited utterances. The defendant was seen hurrying down the fire escape from the victim's apartment. The victim never repudiated the statement.

In these cases the excited utterances were admissible because of their inherent reliability, the stress of the immediate situation and the fear of death. In each of these cases the victim died so that only their identifying statements remained. Here, in contrast, the victim is not dead and repudiated the statement accusing defendant of the shooting.

As stated, the reliability of Peduto is in doubt whatever his testimony. But the majority also discounts the rule followed in the this Court that conflicting testimony by one witness is an

insufficient basis on which to convict a defendant. "When all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for its determination of either" People v. Jackson, 65 NY2d 265, 272; see also People v. Stewart, 40 NY2d 692, 699 [irreconcilable testimony by a single witness on the cause of death left the jury with no basis for concluding beyond a reasonable doubt that the defendant's assault caused the death of the victim]).

Under the circumstances of this case, some type of corroboration was required to find the defendant guilty beyond a reasonable doubt. While corroboration is generally not necessary in admitting evidence of an excited utterance because its reliability is inherent in the circumstances in which it is made, those safeguards are absent here. In People v. Brown, 80 NY2d 729, 736 this Court required corroboration of statements made by a witness during a burglary and admitted at trial under the present sense exception to the hearsay rule. The statements consisted of the 911 tape of a telephone call made by the witness to the police. Just as the present sense impression required some corroboration in Brown, so here a repudiated identifying statement by a person with a motive to lie should be corroborated.

For these reasons, I dissent.

Order affirmed. Opinion by Judge Levine. Chief Judge Kaye and Judges Bellacosa, Ciparick and Wesley concur. Judge Smith dissents and votes to reverse in an opinion.
Decided December 1, 1998

MEMORANDUM-DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE NEW YORK STATE SUPREME COURT

The People of the State of New York, Respondent, v. Frank Fratello, Appellant. [663 NYS2d 169] - Judgment, Supreme Court, Bronx County (Dominic Massaro, J.), rendered April 25, 1996, convicting defendant, after a nonjury trial, of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 10 to 20 years and 3 to 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The court had ample basis upon which to credit the victim's inculpation of defendant in the form of an excited utterance at the scene, while discrediting the victim's highly suspect and thoroughly impeached efforts, as a defense witness, to exculpate defendant. Likewise, the court properly rejected defendant's purported alibi.

The victim's excited utterance, made under the stress of nervous excitement resulting from his wounds, was properly admitted. The declarant was a participant in the events, clearly speaking from his personal observations (see, People v. Caviness, 38 NY2d 227, 231).

The court property exercised its discretion when it declined defendant's request to present certain expert testimony, since the evaluation of the victim's ability to identify his assailant in the circumstances of this case did not require any specialized knowledge beyond the ken of the trier of fact (see, People v. Cronin, 60 NY2d 430), which, in this nonjury trial, was the court itself.

We perceive no abuse of discretion in sentencing.

We have considered defendant's remaining contentions and find them to be without merit. Concur--Milonas, J.P., Rubin, Mazzarelli and Andrias, JJ.

TRIAL TRANSCRIPT

A-9 Proceedings 282

shows a prior bias.

Now, it could very well be, looking at the circumstances of the way this incident occurred, that in the middle of the night he drives by a car -- I think there is some information somewhere there were four, five people in this car. There is no information anywhere, even in the statements which were made, that he ever really saw anyone.

They drive by -- and the shooting's from the rear, he just probably assumed or whatever and picked on Mr Fratello.

That event, your Honor, would also go to the excited utterance. I mean, the cases that your Honor I'm sure has reviewed have shown where there is a bias on the part of the declarant, it goes to the issue of whether or not it was a reflective statement as well as whether or not it was a spontaneous statement.

I know your Honor's ruling, but it goes to the issue of reliability of the statement, too.

THE COURT: Doesn't this go to weight rather than admissibility?

Distinguish for me how it goes to

A-10 Proceedings 283

admissibility rather than weight.

MR. VICTOR: Well if the statement is in any way shown to be unreliable, all right, then you haven't met the two-prong test, then it is not admissible. Or if the witness is available to the Court -- I mean, to the District Attorney, if he's available, the statement is not admissible; the witness should be put on the stand and he should be put on the stand by the People to prove

their case. Availability is the issue, reliability is the issue, either one of those two prongs -- and it is their burden to prove it. If they don't prove to the Court both reliability and unavailability, these statements are not admissible.

THE COURT: Has not the Court, though, based on its ruling on the threshold that it is an excited utterance, covered the area of reliability?

It's accepted the fact that it was non-reflective, that it was not made -- that it was made in response to a startling event. So it seems to me at first blush, without ruling finally, that reliability falls into second

place.

Your argument on availability, however, is perhaps more viable.

I'm still listening.

MR. VICTOR: Well, certainly on availability there is nothing more that need be said by me. We've already established he is available. He is on his way over. If he is available for the District Attorney, they haven't proved unavailability.

That's the end of that issue. But if your Honor deemed it worthy, I would prove those other items -- and your Honor could consider them both as reconsideration of your other prong and your ruling, because I did want to establish them in that situation, too. That issue was address [sic] in the cases I submitted. I believe it was in Norton as well as some of the other cases where they said -- it was almost tracking in this case -- where they said a retraction should be taken into consideration by the Court on whether or not it was an excited utterance, as well as a past motive on the part of the declarant to fabricate. Those are items that should be considered.

of the Federal Government; namely, the Federal Bureau of Investigation by any of these individuals until, as was testified to by the FBI Special Agent and the United States Assistant Attorney General [sic] for the Eastern District of New York, until such time as late as or early as the case maybe as last week.

MR. VICTOR: In addition to all of that, Your Honor, apart from that, the -- which the events have developed, while it is ordinarily within the Court's ability in non-jury cases to hear the facts, listen to legal arguments and review documents off the record, in this particulars [sic] case I think it's placing too far an undue burden upon the Court. I mean, there have been just too many things off the record which Your Honor has had --

THE COURT: Only in terms of time, only in terms of time. You made your record.

MR. VICTOR: Well, I do move for mistrial, Your Honor, in view of the

totality of events that have occurred in this particular case.

THE COURT: What would you care to respond to that?

MR. MULVY: Your Honor, as Your Honor stated, the last minute items that came to the People's attention, there's been a hearing, there's been a ruling on it, I've never heard the name Glacerio Castaldo before.

THE COURT: We don't have to go through that again. We've already established your position on that. Let's move to the mistrial application.

MR. MULVY: And defendant has waived his right to a jury trial. He fully knew that Your Honor would be deciding all the

facts. Both the facts and the law in this case. He was fully aware that if any legal issues were to arise and Your Honor would have to decide them as well as the facts, whatever is occurring at this point the difficulty he foreseen [sic] this ahead of time and for whatever reason waived his

c/lr Proceedings 576

right to jury trial presumably for his own benefit and the People oppose mistrial at this time for those reasons.

THE COURT: Based on the application for mistrial, the reason being put for undue burden on the Court, the way the case has evolved, the application is denied.

MR. VICTOR: Not just merely undue burden upon the Court, it has prejudiced, in my view, prejudiced the defendant in this particular instance and I think in the interests of justice, as well, that a mistrial ought to be granted.

THE COURT: Denied. We'll see eachother Monday at 9:30 in the morning. We'll see each other then Monday 9:30.

(Whereupon, the case is adjourned to Monday, April 17, 1995, at 9:30 a.m.)

jm-a Proceedings 587

THE COURT: Court's already ruled on it. There was no motive. It was spontaneous.

MR. VICTOR: I would like to get some dates, Your Honor, as to when that letter was turned over.

THE COURT: Yes.

MR. VICTOR: And, also, we just brushed over it, but all these prior bad acts that were in the possession of Mr. Mulvey.

THE COURT: Mr. Victor, you must remember again he was your witness, Mr. Peduto, so even if the People had a host of prior bad acts.

MR. VICTOR: These things may have impacted upon my calling him, Your Honor, and whether I would have waived a jury. Both.

THE COURT: I don't see how that in anyway implies whether or not a jury trial would have been waived. That was a decision made as a trial strategy early on, and in any event, Mr. Peduto was always your witness, never the People's witness.

MR. VICTOR: Your Honor, it would have impacted tremendously upon it because all

jm-a Proceedings 588

these other collateral matters would now have been, it would have been apparent that all of these collateral matters that ordinarily would not go before a jury, would come out, hearings, et cetera. All of these things would weigh on my decisionto waive a jury.

THE COURT: I don't think there's anyway we could have predicted the necessity for hearings that were required here at the time that decision was made. However, your exception certainly is noted. Now, with respect to that letter.

MR. VICTOR: And any other information that they have, Your Honor, they haven't revealed it.

THE COURT: I find no burden on the part of the People to turn anything else over under Brady or Rosario in him being your witness.

MR. VICTOR: If it's in, I would like him to identify for the record and preserved for possible appeal.

THE COURT: By all means, that would be correct.

jm-a Proceedings 602

Mr. Peduto's letters that he was testifying. It's the first time I

got the letter in my possesion.

MR. VICTOR: Excuse me, may I see the letter, please?

THE COURT: March 29th ws the day that Mr. Peduto testified.

MR. MULVEY: That's the first time I had my hands on that letter. Your Honor.

MR. VICTOR: You had this. Well, Your Honor, having had this in his possession on the date that Mr. Peduto testified, I should have had it before I made a decision to call Mr. Peduto to the stand. This is outrageous. Absolutely outrageous. Had I had this, I would have thought twice about it.

MR. MULVEY: Your Honor, it's Mr. Victor's witness, and I don't see how in anyway he can hold me responsible to turn over Rosario material for his witness.

MR. VICTOR: This is Brady material.

MR. MULVEY: As a matter of fact, he should have had the witness and turned it over to be because he --

jm-a Proceedings 603

THE COURT: It's Brady. The material is exculpatory material.

MR. VICTOR: This is the victim of the crime. It has bearing on the credibility of the victim of the crime.

MR. MULVEY: Mr. Victor had to get the letter and turn it over to myself, Your Honor.

THE COURT: Well, in any event, I have already ruled, but your further exception exception is certainly noted, Mr. Victor.

Now, do you wish to proceed with the defense case?

MR. VICTOR: Well, obviously not, Your Honor. I want to read what has just been given to me.

THE COURT: Wait one second.

MR. VICTOR: I don't know how this impacts on my case.

THE COURT: One second. The material just given to you is for the benefit of your review with respect to rebuttal witness to be called by the people tomorrow morning. There is nothing whatsoever to do with your review

Proceedings 1104

was cross examining Mr. Peduto. He makes an application to you, it appears in the record,Your Honor, these things to to his motive for doing X Y and Z.

Well, I needed them for the exact same reason. I should have been given all of that stuff as Brady material prior to the time I ever made a decision to call him to the stand.

The prejudice is so cumulative, it's incredible, Your Honor.

The sanctions which I asked, dismissal. That's the sanction I ask.

THE COURT: What's the sanction?

MR. VICTOR: Dismissal. Dismissal of the charges, or and dismissal of the charges with prejudice. Or a mistrial, with prejudice.

Because they caused it. When a mistrial is caused through the wrongful action of the District Attorney, then a mistrial is with prejudice. That's what I'm asking for.

MR. MULVEY: Your Honor, first of

Proceedings 1113

ago, had I had them in my possesion, or had I been aware the Police Department had them in their possession.

THE COURT: Are they, Mr. Victor?

MR. VICTOR: Obviously, anything that has bearing on Guy Peduto's, either motive to hurt my client, or bearing on his credibility is Brady material.

He's the victim in the case. And anything that bears on his

credibility or motive is Brady material to me, and it would have affected me tremendously, on two major decisions I made in the case.

One is to whether I go jury or non-jury. And the other is whether I even call him to the stand.

Without that material, I couldn't make an informed decision, and called him.

What has been a simple excited utterance case has developed into all of these other side issues. It became very complicated.

THE COURT: That is true.

a dr Proceedings 1194

indeed, the letter was in any way identified.

But as you recall, no identification was ever made of a letter. It was simply marked and never admitted into evidence.

MR. VICTOR: Your Honor, that doesn't detract from the fact that I should have been given a copy. I may have been able to utilize it. I may have introduced that letter, or I may have altered my trial strategy.

THE COURT: By virtue of the fact that the People attributed it to Mr. Peduto, even though he denied that it was his; right?

MR. VICTOR: Absolutely.

THE COURT: Okay.

MR. VICTOR: There are a lot of things that I would have done differently, had I had all the information.

Number one, I would have reconsidered my advice to my client to waive a jury.

Number one, I certainly would be reconsidering whether or not I would call

a dr Proceedings 1195

Guy Peduto.

I know for certain, at this juncture, with all the material that I have in my possession now, and it's only the tip of the iceberg, we haven't been given the file on Peduto. I would have not called him as my witness.

THE COURT: You're not suggesting the letter was exculpatory. It's inculpatory if it, in fact, was his letter.

MR. VICTOR: I woudn't have all these items coming in, and opening Pandora's box.

THE COURT: The letter is not in evidence.

MR. VICTOR: Your Honor, there is enough information in the record, gone to the trier of fact, of that letter, to prejudice my client's right to a fair trial.

The trial would be wholly different trial if it were just the so-called excited utterance. It would be a

a dr Proceedings 1196

different trial. And I would have refuted it in other ways.

THE COURT: There wuld have been no trial if excited utterance were not so determined.

MR. VICTOR: Even with the admissibility of the excited utterance, I would have attacked it a different way.

THE COURT: That is past. That's the law of the case.

MR. VICTOR: What I'm trying to demonstrate is the prejudice of my client. That's one of the items of prejudice.

THE COURT: I understand.

Again, I'm not persuaded that the excited utterance wuld have come out in any different manner, except as an excited utterance.

As to the trial strategy and Brady issue, by all means, continue.

MR. VICTOR: That's not the reason I'm here.

I'm saying I was entitled to

principle that they related, that had there not been a timely disclosure, it would have affected, if it had affected the nature of the evidence or altered defendant's trial strategy, it would have been a violation.

And they site [sic] certain cases. And it would have absolutely altered my trial strategy, the defendant's trial strategy in this case, had we been given that information.

THE COURT: Should the Court find that it is Brady.

MR. VICTOR: Brady, or whether it's a violation of due process, as ****** de novo says.

There are obligations beyond Brady that are a matter of due process. The Novoa concept of fairness embodying why due process of State and Federal Constitutions imposes upon the prosecution a duty to apprise the defendant of evidence favorable to the accused.

Anything that detracts from the

possession, of Mr. Peduto, is currently incarcerated and be turned over. I did turn that over.

However, I do beleve, I do know, that Mr. Peduto has prior convictions. I've questioned him about those while he was on the witness stand.

I don't believe there's any requirement for me to notify Mr. Victor of those before the trial. Again, it's not my witness.

THE COURT: Thank you.

MR. MULVEY: I intend to finish the memorandum and submit it.

THE COURT: I'll afford you the opportunity .

Mr. Victor, could we start by addressing the last item. Namely, Mr. Peduto's criminal background.

MR. VICTOR: Okay.

THE COURT: Which, of course, was known to you when you brought him, in the sense --

MR. VICTOR: I knew he was sitting

a dr Proceedings 1216

in jail.

THE COURT: He was a Federal prisoner.

MR. VICTOR: But I don't know the extent. I don't have his rap sheet or all theinformation that they have.

THE COURT: Tell me how you see that as prejudicial, the fact that you brought up somebody from Federal custody.

MR. VICTOR: It's Hornbook law. I'm siting from Richardson on evidence, on dieing [sic] declarations, which are somewhat akin to the excited utterance.

It says the dieing [sic] declaration, when admitted, is to the testimony of the declarant, Peduto.

The defendant may therefore impeach the declarant's credibility by all apropriate methods available to impeach a living witness. Thus, the defendant may show that the declarant had been convicted of a crime, et cetera, et cetera, et cetera,. All available methods.

THE COURT: This was known to the

a dr Proceedings 1217

Court. This was known to you.

Clearly, the man was incarcerated at the very moment he testified.

MR. VICTOR: Your Honor. It's not the one criminal event for which he was incarcerated. it's all of these events which they still have. All of these other bits of information, including the most important crime, which, also the crime, if they're

accurate, is the attempted murder of my client, Mr. Fratello. The most important of all crimes is the attempted murder of Fratello.

THE COURT: I heard that, yes.

MR. VICTOR: I'm entitled to it. When they introduced that excited utterance, it's the same as if they said,introduced Mr. Peduto as a witness, and I'm entitled to all Rosario material on it. I'm entitled to all the due process rights to which a defendant is entitled.

THE COURT: But it was your witness.

a dr Proceedings 1218

MR. VICTOR: What?

THE COURT: It was your witness.

MR. VICTOR: Go back, trial strategy. He would never have been my witness had I been given timely information.

THE COURT: What do you wish to say in closing?

MR. MULVEY: Yes, your Honor.

MR. VICTOR: I'm not finished.

THE COURT: I'm sorry, please continue.

MR. VICTOR: I believe, your Honor, your Honor did declare him to be a hostile witness. You said they didn't have a require to call him, he was legally unavailable.

THE COURT: No. No. No.

MR. VICTOR: I think you said you could call him and examine him as a hostile witness.

THE COURT: He was never declared a hostile witness.

MR. VICTOR: Or words to that

a dr Proceedings 1226

On prejudice, this mere argument, I think it's outrageous for him to come here, before your Honor, even though this is non-

jury, and your Honor has the ability to dissect and so forth.

For him to interject all of that information, which he knows is not admissible at the trial, and utilizes this time, this oral argument to bring it to your Honor's attention, it's their in the subconscious, your Honor. You heard it. It's cumulative prejudice.

This case, this trial is getting to be a disgrace, and I always renew my motions for a mistrial with prejudice.

THE COURT: I've heard enough.

MR. MULVEY: Your Honor, if I may, I just raise what Mr. Victor brought up the issue.

THE COURT: Yes, I understand.

(Continued on the following page...)